Supreme Court, U.S.
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No. 97-426

In The

Supreme Court of the United States

October Term, 1996

GERALD C. WOYTHAL,

Petitioner,

vs.

TEX-TENN CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Tex-Tenn Corporation, has no parent companies and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

This case essentially presents a single question for the Court. In the wake of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), what evidence of intentional age discrimination must a plaintiff proffer to create a jury question and, thereby, withstand a motion for summary judgment or directed verdict? Petitioner has misstated or omitted critical facts which were considered by the district court and the court of appeals when each found that Petitioner failed to produce sufficient evidence of age discrimination to withstand Respondent's Motion for Summary Judgment. The material, undisputed facts of this case reveal that under any standard or interpretation of *Hicks*, Petitioner failed to produce any evidence from which a reasonable jury could find that Respondent was guilty of intentional age discrimination.

Tex-Tenn Corporation was founded by Mr. John Seifert (Date of Birth: 08/14/28) in 1981. From 1981 to 1983, Petitioner was one of two engineers who worked for Tex-Tenn and, at that time, held secondary responsibility for necessary engineering functions. From 1983 to 1988, Petitioner served as Plant Manager for Tex-Tenn. In 1988, Tex-Tenn filed for bankruptcy protection for the second time and shut down operations for approximately six months. When Tex-Tenn resumed operations in December of 1988, Mr. Seifert asked Petitioner to come back as Chief Engineer. At that time, Petitioner was approximately sixty-two (62) years old. From December 1988, until his employment ended in December of 1993, Petitioner was Tex-Tenn's Chief Engineer and was responsible for overseeing all engineering functions of the company. (R. 9).

In April of 1993, Tex-Tenn hired Mr. James Carico (Date of Birth: 01/24/45), and in July of the same year, Mr. Carico was named Tex-Tenn's Operations Manager. Following Mr.

Carico's appointment as Operations Manager, Petitioner reported directly to Mr. Carico (he had previously reported directly to the President, Mr. John Seifert). By 1993, Tex-Tenn was experiencing rapid growth and expansion, and Mr. Seifert became concerned about the ability of the company's engineering department to meet the demands created by that growth. He was also concerned about rumors which had been circulating for some time that Petitioner was considering retirement. Mr. Seifert decided to hire an additional engineer and discussed this option with Petitioner, who agreed that additional support in the engineering department would be beneficial in meeting the demands created by Tex-Tenn's expansion. However, Petitioner displayed little interest in participating or assisting in the recruitment of an additional engineer. With no assistance from Petitioner, Mr. Seifert and Mr. Carico recruited Bill Soltes to provide engineering support in addition to that provided by Petitioner. Petitioner's departure precipitated Mr. Soltes placement in the position of Chief Engineer, Petitioner's former position. (R. 9).

The rumors regarding Petitioner's possible retirement and concern over Tex-Tenn's increasing need for engineering support led Mr. Seifert to approach Petitioner on several occasions to inquire what his plans were and what role he wanted to play in Tex-Tenn's future. (R. 9). Contrary to Petitioner's assertions, Mr. Seifert did not pressure Petitioner to retire and did not attempt to procure Petitioner's retirement. The court of appeals reviewed the entire summary judgment record and found that no one at Tex-Tenn even mentioned retirement or suggested that Petitioner retire. In fact, the rumors concerning Petitioner's impending retirement were initiated by Petitioner himself. (Petition for a Writ of Certiorari, App. A at 3a (hereinafter "Petition")). Petitioner's own deposition testimony reveals that Mr. Seifert asked Petitioner only what his plans were:

> **Q.** Why do you believe that Tex-Tenn is guilty of age discrimination with respect to you?
>
> **A.** Well, I was discharged on December 20th by Mr. Carico. And it just seems to me that — Mr. Seifert would ask me questions like: "Gerry, what do you want to do for Tex-Tenn? What are your plans?" And I just told him that I'd like to continue working at Tex-Tenn and continue so until the age 70, and if I didn't tell it directly to him, once — I'm not sure about the age 70, I forget if I ever mentioned that to him, but I do know that I did say I wanted to continue working for Tex-Tenn.
>
> Because he asked me this numerous times, I got the impression that he was trying to tell me that maybe I should retire. And under that circumstance I believe that was age discrimination.

(R. 13).

At most, this testimony reveals that Petitioner speculated that Mr. Seifert wanted him to retire. Petitioner presented no evidence that Mr. Seifert questioned him about retirement or pressured him to retire. It is clear, however, that rumors were rampant throughout Tex-Tenn that Petitioner was considering retirement. During the year 1993, he told many employees that he was planning to retire. The uncontroverted evidence is that Mr. Seifert's motivation was to determine what Petitioner's plans were so that he could ensure continued engineering support during a critical stage of expansion, not to procure Petitioner's retirement. (R. 9).

In his role as Petitioner's supervisor, Mr. Carico determined that Petitioner was not putting forth the effort necessary in his position as Chief Engineer. In October of 1993, Mr. Carico discussed with Petitioner several areas of concern, which he documented and placed in Petitioner's personnel file. Specifically, Mr. Carico spoke with Petitioner concerning his failure to properly maintain equipment and asked that Petitioner develop a preventative maintenance schedule. Mr. Carico also discussed with Petitioner his concern that Petitioner was uninterested in solving problems and displayed a negative attitude. Although he disagreed with Mr. Carico's account of the substance of the October 1993 meeting, Petitioner admitted that Mr. Carico met with him and that the meeting involved Petitioner's performance. (R. 9 and R. 13).

Following the October 1993 meeting, Mr. Carico continued to be frustrated by what he perceived to be an inadequate level of participation and effort on Petitioner's part. On approximately December 20, 1993, Mr. Carico again met with Petitioner to discuss his concerns. Mr. Carico advised Petitioner that Tex-Tenn needed his participation in the company and that if he chose not to participate, he would not be needed at Tex-Tenn. Mr. Carico told Petitioner that he wanted to know by the end of December whether Petitioner intended to be an active participant in the company. (R. 9 and R. 13).

Petitioner acknowledges that the December 20, 1993 meeting with Mr. Carico took place and admits that this meeting also involved a discussion of Petitioner's performance of his duties for Tex-Tenn. However, Petitioner contends that in this meeting, Mr. Carico terminated his employment and told him to vacate his office by December 30, 1993. At some point between the December 20, 1993 meeting and December 30, 1993 (Petitioner's last day of employment), Mr. Seifert learned that Petitioner believed he had been discharged. Mr. Seifert met with

Petitioner on December 30 and told him that he could keep his keys and could come back to work at Tex-Tenn if he changed his mind. Despite Petitioner's apparent desire to terminate his employment with Tex-Tenn, Mr. Seifert continued to represent to Petitioner, up until the last day he worked, that he was willing to work something out with Petitioner and expressly told him "the door is always open." (R. 9 and R. 13).

The district court found the existence of a material factual dispute surrounding the circumstances of Petitioner's departure from Tex-Tenn. However, both parties agree that a meeting between Mr. Carico and Petitioner took place wherein Mr. Carico expressed concerns over Petitioner's performance and that as a result of that meeting, Petitioner's employment with Tex-Tenn ended. Tex-Tenn is willing to concede for purposes of summary judgment that Petitioner believed he was fired during the course of that meeting. Assuming that a jury could find that Petitioner's belief that he was fired was reasonable, the district court and the court of appeals found that Tex-Tenn had carried its burden of articulating justifiable non-discriminatory reasons for the termination of Petitioner. Tex-Tenn was faced with an increasing need for engineering support and a Chief Engineer who appeared increasingly disinterested in the company's future and displayed a negative attitude. (Petition, App. A at 6a and App. B at 20a-24a). Petitioner admits that there was dissatisfaction with his work and that Mr. Carico met with him in October 1993 and again in December 1993 over perceived performance deficiencies. Although Petitioner may have disagreed with Mr. Carico's assessment of his performance and abilities, he offered no evidence that Mr. Carico's opinions were not legitimately held.

Petitioner also argues that the timing of the hiring of Mr. Soltes provides support for his claim of age discrimination. Petitioner provides no support or evidence as to how Mr. Soltes'

hiring evidences age discrimination against Petitioner. Petitioner clearly knew that Mr. Seifert had been looking for additional engineering support for months. (R. 9). After reviewing the record, the court of appeals found that Tex-Tenn had decided to hire another engineer long before Petitioner left and that Mr. Soltes was initially hired to assist Petitioner, not replace him. (Petition, App. A at 8a). Petitioner's assertion that the search for Mr. Soltes was conducted without his consultation or input ignores critical facts. As with other pressing matters within Tex-Tenn and the engineering department, Petitioner displayed no initiative or interest in assisting Mr. Seifert in finding additional engineering help. Mr. Seifert and Mr. Carico were forced to look for an engineer with no assistance from Petitioner. (R. 9).

REASONS FOR DENYING THE WRIT

Every court of appeals has directly addressed the standard for evaluating motions for summary judgment or directed verdict in light of this court's opinion in *Hicks*. The majority of the circuits have developed a standard which is consistent with *Hicks* and traditional principles of summary judgment. However, four circuits have misinterpreted *Hicks* in analyzing the plaintiff's burden in the face of a motion for summary judgment or directed verdict. In reviewing the district court's grant of Respondent's summary judgment motion, the Sixth Circuit conducted the proper analysis which has been developed by a majority of the circuits and which is appropriate and consistent with the guidance of the Court in *Hicks*. Respondent opposes certiorari in this action because the Sixth Circuit's affirmation of summary judgment in this case is consistent with the law of the Court and a majority of the circuits. Further, contrary to Petitioner's assertion, Respondent would have prevailed on its motion under any standard that could be applied.

Respondent urges the Court to deny the petition for certiorari

and spare Respondent the burden of further time and expense in this matter. Should the Court determine that it is appropriate and necessary to clarify its opinion in *Hicks* and elaborate on the plaintiff's burden in the face of a motion for summary judgment or directed verdict, justice would be better served by granting certiorari in a case where the petitioner has been harmed by the application of a standard which is inconsistent with the Court's precedents.

In his petition, Petitioner presents three questions to the Court for review. Essentially, two of those questions may be phrased as a single issue: Where a plaintiff does not have direct evidence of unlawful discrimination and is proceeding under the burden shifting scheme developed in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), what evidence must the plaintiff produce to avoid a summary judgment or a directed verdict? In his third question presented for review, Respondent asks the Court to address the issue of whether the evidence introduced in a plaintiff's prima facie case may be reconsidered when a plaintiff reaches the point where he must introduce evidence of pretext and unlawful discrimination. Respondent does not believe that any circuit has held that a plaintiff may not rely on the evidence presented in his prima facie case in opposing a motion for summary judgment or a directed verdict. Because the facts of this case and the opinions of the courts below do not raise this issue, Respondent will not address it here.

The burden-shifting scheme developed in *McDonnell Douglas Corp. v. Green* requires that the plaintiff initially proffer enough evidence to establish a prima facie case of discrimination. Having done so, the defendant must articulate a legitimate, non-discriminatory reason for the alleged adverse employment action. At this point, the plaintiff must set forth facts from which a reasonable jury could find that the defendant's

articulated reason(s) are not the true (or only) reason(s) and that the defendant was actually motivated by unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

In 1993, the Court decided *St. Mary's Honor Center v. Hicks* and resolved a division among the federal courts in holding that a fact-finder's determination of pretext, without a finding of discrimination, was insufficient to support a judgment in favor of the plaintiff. In the wake of *Hicks*, the federal courts have developed standards for determining what evidence must be produced by a plaintiff to survive a motion for summary judgment or directed verdict. It is inaccurate, however, to divide the federal courts into "pretext-only", "pretext-plus", and "other" when describing the courts' positions in evaluating discrimination claims at the summary judgment or directed verdict stage. These labels, while convenient, are not adequately descriptive of the actual analysis that has been performed in the various circuits.

With the exception of the Third, Tenth, Eleventh and D.C. Circuits, the federal courts have approached the review of a grant or denial of such motions by applying what may be called the "totality of the evidence standard." The courts, in reviewing a motion for summary judgment or directed verdict, look to the entire record to determine whether the plaintiff has introduced enough evidence to allow a reasonable jury to render a verdict in the plaintiff's favor. A careful reading of the opinions of the majority of the circuits reveals that they have focused on all the evidence proffered by the plaintiff, whether introduced to establish the prima facie case, to demonstrate pretext, or to provide additional evidence of a discriminatory animus.

No circuit has held that a plaintiff ***must*** introduce evidence

of discriminatory animus in ***addition*** to evidence of pretext. Respondent erroneously cites the First and Fifth Circuits as "pretext-plus" jurisdiction. The First Circuit, in *Udo v. Tomes*, 54 F.3d 9 (1st Cir. 1995) (cited by Petitioner),[1] did not hold that a plaintiff must necessarily have additional evidence of discrimination after producing evidence of pretext. Rather, in *Udo*, the court said that the plaintiff must produce evidence from which a jury could find: ". . . (1) that the employer's articulated reason for laying off the plaintiff is a pretext, and (2) that the true reason is discriminatory." *Udo*, 54 F.3d at 13 (1st Cir. 1995) (citing *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995)). The plaintiff's burden of production was further explained: "While the plaintiff ***may rely on the same evidence to prove both pretext and discrimination***, the evidence must be sufficient for a reasonable fact finder to infer that the employer's decision was motivated by discriminatory animus." *Id.* (Emphasis added).

Likewise, the Fifth Circuit has not imposed a ***requirement*** that a plaintiff produce additional evidence of discrimination after introducing evidence of pretext. Sitting *en banc*, the court in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996), provided an excellent explanation of the plaintiff's burden in surviving a summary judgment motion:

> To sustain a finding of discrimination, circumstantial evidence must be such as to allow a rational fact finder to make a reasonable inference that age was a determinative reason for the employment

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1. In addition to "pretext-only" and "pretext-plus", Petitioner maintains there exists a third category of circuits which, according to Petitioner, apparently have not developed a well-defined standard in light of *Hicks*.

> decision. The fact finder may rely on all the evidence in the record to draw this inference of discrimination. ***In tandem with a prima facie case, the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually, permit a finding of discrimination without additional evidence.*** Thus, a jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains. The employer, of course, will be entitled to summary judgment if the evidence ***taken as a whole*** would not allow a jury to infer that the actual reason for the discharge was discriminatory.

Rhodes, 75 F.3d at 994 (emphasis added). The *Rhodes* opinion leaves no doubt that the Fifth Circuit has adopted the "totality of the evidence" rule in considering motions for summary judgment in discrimination cases. The court in *Rhodes* further explained the appropriate analysis in considering such motions:

> The evidence necessary to support an inference of discrimination will vary from case to case. A jury may be able to infer discriminatory intent in an appropriate case from substantial evidence that the employer's proffered reasons are false. The evidence may, for example, strongly indicate that the

> employer has introduced fabricated justifications for an employees's discharge, and not otherwise suggest a credible nondiscriminatory explanation.
>
> By contrast, if the evidence put forth by the plaintiff to establish the prima facie case and to rebut the employer's proffered reasons is not substantial, a jury cannot reasonably infer discriminatory intent. . . .

Id.

The "totality of the evidence" standard used in *Udo v. Tomes* and *Rhodes v. Guiberson Oil Tools* has also been adopted by every other circuit with the exception of the Third, Tenth, Eleventh and D.C. Circuits. *See, e.g., Fisher v. Vassar College*, 114 F.3d 1332 (2nd Cir. 1997):

> When a court comes to consider, either upon defendant's motion for summary judgment, or after a plaintiff's verdict, whether the evidence can support a verdict of discrimination, no special rules affect the weight to be given to the prima facie case, the truthfulness or falsity of the employer's explanation, or any other piece of evidence. As in any other type of case, the judge must analyze the evidence, along with the inferences that may be reasonably drawn from it, and decide if it raises a jury question as to whether the plaintiff was the victim of discrimination. If so, summary judgment must be denied and/or a jury verdict for plaintiff must be sustained. If not, the

> defendant is entitled to summary judgment or to the overturning of a plaintiff's verdict as clearly erroneous.

Id. at 1347. *See also Henson v. Liggett Group, Inc.*, 61 F.3d 270, 275 (4th Cir. 1995) ("... the 'straightforward' question to be answered ... is whether the plaintiff has successfully demonstrated that she was the victim of age discrimination ... [The plaintiff] ... must demonstrate by a preponderance of the evidence that [the employer's] reasons were a pretext for discrimination."); *Sirvidas v. Commonwealth Edison Co.*, 60 F.3d 375, 378 (7th Cir. 1995) (To defeat summary judgment a plaintiff must produce enough evidence to allow a reasonable fact-finder to infer that the employer's articulated reasons were false and that the employee was actually discharged because of his age.) (*but see Perdomo v. Browner*, 67 F.3d 140 (1995)); *Krenik v. County of LeSueur*, 47 F.3d 953, 958-60 (8th Cir. 1995) (Plaintiff's evidence must allow inference of intentional discrimination which could be accomplished through prima facie case and evidence of pretext.); *Bradley v. Harcourt Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996) (The plaintiff "... bears the ultimate burden of persuading the court that the stated reason for the discharge was false and the true reason for the discharge was unlawful sex discrimination. [citations omitted] To avoid summary judgment, [the plaintiff] 'must do more than establish a prima facie case and deny the credibility of the [defendant's] witnesses.' *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994) She must produce 'specific, substantial evidence of pretext.' *Id.*").

Thus, a careful reading of the majority of the circuits' opinions on the plaintiff's burden at the summary judgment or directed verdict stage reveals that, consistent with the opinion of the Sixth Circuit in the present case, each has developed an analysis consistent with *Hicks* and with the law governing the

grant or denial of summary judgment. A minority of circuits have taken an approach that is not consistent with *Hicks* and is violative of summary judgment jurisprudence. The Third, Tenth, Eleventh and D.C. Circuits have all held that a plaintiff may survive summary judgment on a showing of pretext without necessarily introducing any evidence of discrimination. *See Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1066-72 (3rd Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 2532 (1997) (Plaintiff must meet threshold requirement of prima facie case and showing of pretext, but it is the province of the jury to draw inferences from the testimony, including the inference of discrimination.); *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995); *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997); *AKA v. Washington Hospital Center*, 116 F.3d 876 (D.C. Cir. 1997).

The question of the proper analysis in the context of a motion for summary judgment or directed verdict post-*Hicks* must necessarily arise within the broader context of summary judgment jurisprudence. The Court's decisions in the landmark cases of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) provide the framework within which the principles enunciated in *Hicks* must be examined. In *Anderson v. Liberty Lobby* the Court said:

> . . . the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial . . . in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could

> properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

Id. at 249, 251. And in *Celotex*, the Court made it plain that a plaintiff must produce sufficient evidence to prove every element of his or her claim:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. . . . The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

477 U.S. at 322-23. *See also Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' ").

Applying the standards developed by the Court in ruling on any summary judgment motion to the holding in *Hicks*, that a fact-finder is ***permitted*** but not ***required*** to find discrimination from a showing of pretext, the only consistent and rational conclusion is the "totality of the evidence" standard applied by the Sixth Circuit in the present case and adopted by the majority of the circuits.

CONCLUSION

It may be necessary for the Court to resolve the inconsistent standards which are applied in the federal courts in reviewing motions for summary judgment or directed verdict. If the Court determines that it should resolve the conflict that exists, it will most certainly have occasion to review a decision from one of the circuits that has applied the faulty "pretext-only" standard. A grant of certiorari in such a case would present the Court with an opportunity both to provide guidance to the circuits on the appropriate legal standard and to right an injustice caused by the application of the incorrect standard. The present case was decided under the appropriate legal principles developed by the Court in *McDonnell Douglas* and *Hicks*. Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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